Glen Falls Building and Construction Trades Council and International Union of Bricklayers and Allied Craftsmen, Local Union No. 6 and International Brotherhood of Carpenters and Joiners of North America, Local Ūnion No. 229 and International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 40 and International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 12 and Laborers International Union of North America, Local Union No. 157 and International Brotherhood of Electrical Workers, Local Union No. 438 and International Union of Operating Engineers, Local Union No. 106 and International Brotherhood of Painters, Allied Trades and Glaziers, Local Union No. 466 and Sheet Metal Workers International Association, Local Union No. 83 and United Association of Journeymen and Apprentices of the Plumbing Industry and Pipefitting Industry of the United States and Canada, Local Union No. 7731 and Indeck Energy Services of Corinth, Inc.; Indeck Corinth Limited Partnership; Indeck Energy Services, Inc.<sup>2</sup> Case 3-CE-55

July 16, 1998

# DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On August 7, 1996, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel and Indeck filed exceptions and supporting briefs, and Indeck requested oral argument; the Respondents filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's and Indeck's exceptions.<sup>3</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,<sup>4</sup> and has decided to remand this proceeding as discussed below.

A central issue in this case is whether Indeck is an employer in the construction industry within the meaning of the proviso to Section 8(e).5 The judge found that Indeck is an employer in the construction industry, relying (in sec. II,H of his decision) on "various documents subpoenaed by the Respondents from Indeck." The General Counsel and Indeck have excepted, inter alia, to this aspect of the judge's decision on the ground that the judge had not permitted Indeck and the General Counsel to present testimony explaining the context and meaning of those documents. The General Counsel and Indeck have also excepted, inter alia, to the judge's ruling precluding Indeck from presenting testimony from two witnesses bearing on the question of whether Indeck is an employer in the construction industry.

For the reasons set out below, we find merit in these procedural exceptions, and we shall remand the case to the judge to reopen the record and receive the evidence he erroneously excluded. In remanding this case, we are not at this time passing on any of the other issues raised by the parties' exceptions.

# A. Background

Indeck owns and operates cogeneration facilities, including one in Corinth, New York, at issue here (the Corinth cogen).<sup>6</sup> By letter dated February 20, 1992<sup>7</sup> (the letter agreement), Indeck notified the Respondents that it was committed to constructing its Corinth cogen with union labor and that it would instruct its contractor to execute a project labor agreement. Indeck subsequently accepted the bid of CRS Sirrine, Inc. (Sirrine), a general contractor in the building and construction industry, to build the Corinth cogen for \$71 million.

<sup>&</sup>lt;sup>1</sup>The above-captioned labor organizations (Glens Falls Building and Construction Trades Council and the 10 named local unions) are collectively referred to as the Respondents.

<sup>&</sup>lt;sup>2</sup>The complaint alleges, and the Respondents admit in their answer, that the above-captioned individual Charging Parties (Indeck Energy Services, Inc.; Indeck Energy Services of Corinth, Inc.; and Indeck Corinth Limited Partnership) constitute a single-integrated enterprise and a single employer within the meaning of the Act. The Charging Parties are collectively referred to as Indeck.

<sup>&</sup>lt;sup>3</sup>Thereafter, the General Counsel and Indeck filed answering briefs to the Respondents' cross-exceptions, and reply briefs to the Respondents' answering brief; the Respondents filed reply briefs to the General Counsel's and Indeck's answering briefs and a motion to strike portions of Indeck's answering brief; Indeck filed an opposition to the Respondents' motion, a cross-motion to strike the Respondent's combination brief, and a cross-motion to strike the Respondents' reply brief to Indeck's answering brief; and the Respondents filed an opposition to Indeck's cross-motion to strike the Respondents' combination brief.

<sup>&</sup>lt;sup>4</sup>Indeck's and the Respondents' motions to strike each other's briefs, or portions thereof, are denied.

<sup>&</sup>lt;sup>5</sup> Sec. 8(e) states in pertinent part:

<sup>(</sup>e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

<sup>&</sup>lt;sup>6</sup>Cogeneration facilities, also known as cogens, produce steam and electricity. The steam is sold to industrial companies for use in manufacturing products, and the electricity is sold to public utilities to supplement the output from their own production facilities.

<sup>&</sup>lt;sup>7</sup> All dates are 1992 unless otherwise stated.

In July and September, Sirrine and the Respondents entered into an agreement (the Sirrine-Trades Council agreement) which stated in pertinent part that Sirrine agreed that any contractor or subcontractor employed on the project shall be a signatory to and abide by all of the terms contained in the project labor agreement. A copy of the project labor agreement negotiated by Sirrine and the Respondents was attached to the Sirrine-Trades Council agreement. Sirrine itself was not designated as a signatory to the project labor agreement, and did not sign it.

In April 1993, Indeck declared Sirrine in default and canceled its contract for Corinth. In July 1993, Indeck selected CNF Constructors, Inc. (CNF) to replace Sirrine as the general contractor. Indeck did not require CNF to enter into a project labor agreement for the construction of the Corinth cogen, and CNF did not enter into such an agreement.

On November 9, 1993, the Respondents filed a civil action in the Supreme Court of the State of New York, alleging, inter alia, that Indeck breached the February 20, 1992 letter agreement and that Indeck, through Sirrine as its alleged agent, breached the Sirrine-Trades Council Agreement. The suit was subsequently removed to the United States District Court, Northern District of New York.

### B. The Complaint and Answer

The complaint alleges in pertinent part that by filing their civil action, the Respondents reaffirmed the February 20, 1992 letter agreement and the July/September 1992 Sirrine-Trades Council Agreement, and applied the provisions of those agreements to Indeck. The complaint also alleges that Indeck is not an employer engaged in the building and construction industry and that there was no collective-bargaining relationship between Indeck and the Respondents. The complaint thus alleges that the Respondents have violated Section 8(e) of the Act by entering into, maintaining, and giving effect to an agreement in which Indeck has agreed not to handle or otherwise deal in the products of, or do business with, another employer or person. The Respondents deny, inter alia, the above allegations.

# C. The Judge's Rulings at Issue

On the next-to-last day of the unfair labor practice hearing, February 28, 1996,8 the Respondents introduced into evidence 117 documents that they had subpoenaed from Indeck.9 The judge received them in evi-

dence over Indeck's objections to most of them.<sup>10</sup> Indeck subsequently adduced testimony from its witnesses in regard to 16 of these documents.

On February 29, the judge terminated Indeck's questioning of its witness, Corinth Project Manager Vic Ranalletta, about these documents. The judge expressed his concern about the length of time it was taking Indeck to question Ranalletta. He instructed the parties to provide statements of their positions with respect to these documents. The judge stated that, after reviewing the statements of positions, if he considered the documents to "be no more and no less than what we've already had," he would accept them into the record, but regard them as "surplusage." On the other hand, if he considered some areas "to be of real substance and material to this proceeding," he would "reopen the record and . . . resume [the hearing] somewhere."

Later that day, Indeck informed the judge that it intended to call Sirrine Vice President Jerry Calloway and construction industry expert James Walter as witnesses. Indeck stated that Calloway had been subpoenaed, but that he was unavailable on that day, and had requested that he be rescheduled to testify. Walter was not present at the hearing that day. The judge instructed Indeck to include in its forthcoming statement of position on the above documents a statement of what areas of evidence Indeck would develop from the testimonies of Calloway and Walter. The judge then adjourned the hearing sine die.

Subsequently, the General Counsel submitted to the judge his statement of objections to the introduction of 24 of the documents and his statement of what testimony needed to be presented about each of the documents (including those to which he had no objection as to admissibility).

Indeck argued in its statement to the judge that the 46 specifically identified documents about which it planned to have Ranalletta testify do not speak for themselves. Indeck provided offers of proof as to what it anticipated Ranalletta would testify to about each of these 46 documents, and asserted that Indeck and the General Counsel are entitled to call Ranalletta (and, if necessary, other Indeck employees) to explain the proper, full context of the documents.

Indeck also asserted to the judge, in an offer of proof, that Sirrine Vice President Calloway would testify about what action he took when he received a fax from Indeck's president, Russell Lindsay, in which Lindsay informed Calloway that Indeck's Corinth cogen "must be done according to this [attached] union contract." Indeck stated in its offer of proof that Calloway would testify that, despite Lindsay's fax, Calloway did not take orders from Lindsay, and that

<sup>&</sup>lt;sup>8</sup> All dates in this section are 1996 unless otherwise stated.

<sup>&</sup>lt;sup>9</sup>These documents are identified as RR Exhs. 1–124. The Respondents ultimately withdrew 16 of these identified exhibits. RR Exh. 31, which was not withdrawn, is missing from the record. However, the record establishes that the faxed cover sheet in RR Exh. 31 is the same document as R. Exh. 3 (not RR) Exh. 3, which is in the record

<sup>&</sup>lt;sup>10</sup>The parties ultimately stipulated to the admissibility of 40 of these documents

Calloway had no intention of allowing Indeck to dictate the terms of Sirrine's project labor agreement with the Respondents. Indeck asserted that Calloway would also testify that he never directed Lane, the subordinate Sirrine official responsible for dealing with the Respondents, to use any provisions of the contract attached to the fax, but rather that Calloway left it up to Lane's judgment whether to do so.<sup>11</sup>

Finally, Indeck provided the judge with construction industry expert Walter's resume, and stated in an offer of proof that his testimony would be in support of Indeck's position that it is an owner, not an employer, in the construction industry. Indeck asserted that Walter would testify that certain provisions in Indeck's contracts with CNF and other entities at Corinth were common in owner-contractor construction agreements and that Indeck did not reserve any rights in such agreements that owners do not customarily reserve in their contractual relationships with contractors. Finally, Indeck stated that Walter would testify that, in his opinion, Indeck "is not in the construction industry within the meaning of that term in the parlance of the industry itself."

In his April 8, 1996 Order,<sup>12</sup> the judge received into evidence all of the documents in question that had not been withdrawn. He denied the requests of the General Counsel and Indeck to introduce testimony about the documents. He set forth the contentions of the parties as to the need for testimony about each of the 46 documents specified by Indeck, and ruled as follows:

The proffers of testimony respecting the Respondents' exhibits are rejected as they are, in part, collateral to the issue before me and as they are also cumulative with respect to the very contents of some of the exhibits themselves and cumulative, too, in view of the extensive testimony and documentary material already in the record. It is so ordered.

The judge next denied the request that Sirrine Vice President Calloway be permitted to testify about what action he took when he received the fax in question from Indeck President Lindsay.<sup>13</sup>

Finally, the judge denied the request to permit construction industry expert Walter to testify on various grounds, including the following: (1) Indeck could have had Walter appear as a witness on any one of the hearing dates; (2) the witnesses who testified for the General Counsel and Indeck have experience in the construction industry equal to the credentials listed by Indeck for Walter and Indeck thus had full opportunity to offer equivalent evidence via those witnesses; (3) the proffered testimony could well burden the record to an extent not commensurate with any value gained via an expert's opinion; and (4) the opinion that Walter would offer addresses the very conclusion of law that the Board is charged with making.

# D. Conclusion

It is well established that the Board will reverse a judge's rulings or order a rehearing only when the party urging such measures demonstrates that the judge's ruling was not only erroneous, but also prejudicial to substantive rights. <sup>14</sup> We find that Indeck and the General Counsel have met that burden.

First, we find that the judge committed prejudicial error by denying the requests of the General Counsel and Indeck to introduce testimony about the subpoenaed documents. As discussed above, the judge himself suggested at the hearing that if he considered any of the areas covered by the documents to be of "real substance and material to this proceeding," he would reopen the record to receive the proffered testimony. In his decision, he relied on the documents to make findings adverse to the General Counsel and Indeck, thereby clearly indicating that the documents were of "real substance and material to this proceeding." Nonetheless, he refused to reopen the record to receive testimony explaining the context and meaning of the documents. Given the judge's reliance on the documents, we cannot agree with him that the proffered testimony can be dismissed as either collateral or cumulative.

Second, we find that the judge should have permitted Indeck to call Sirrine Vice President Calloway to testify about what he did in response to the fax he received from Indeck President Lindsay. In his decision, the judge, in apparent reliance on the fax, found that Lindsay sent a union contract to prospective bidders on the Corinth project and notified them that the job "must be done according to that union contract." In these circumstances, it was prejudicial error for the judge to deny Indeck the right to present Calloway's testimony to rebut any implication that Indeck actually

<sup>&</sup>lt;sup>11</sup> In regard to Calloway's failure to comply with his subpoena to testify on February 28 and 29, Indeck attached to its statement of position to the judge a copy of a February 26 letter from Calloway to Indeck's counsel, in which Calloway stated that although he was willing to comply with the subpoena, he was unable to attend on February 27, 28, or 29 because he was currently (i.e., February 26) in Toronto, Canada, and involved in the critical negotiation stage of a significant company reorganization. Calloway asserted that travel from Toronto to Albany, New York (the location of the hearing), is not direct and would require more time than was available. He requested Indeck to ask the judge to schedule his appearance for another day, preferably in New York City rather than in Albany.

<sup>&</sup>lt;sup>12</sup> ALJ Exh. 10.

<sup>&</sup>lt;sup>13</sup> The judge relied on various grounds, including the following: (1) Calloway was subpoenaed but failed to appear because (in the judge's words) "he was busy;" (2) no action was taken to enforce

the subpoena; and (3) Indeck had asserted that Calloway's testimony would take only 20 minutes.

<sup>&</sup>lt;sup>14</sup> Spector Freight Systems, 141 NLRB 1110, 1112–1113 (1963); see Greenleaf Motor Express, 298 NLRB 227 (1990).

dictated the terms of Sirrine's project labor agreement.<sup>15</sup>

Finally, we cannot agree with any of the reasons given by the judge for denying Indeck the opportunity to call construction industry expert Walter to testify. Contrary to the judge's assertion, the record shows that Indeck proceeded reasonably in not presenting Walter for testimony on or before February 29, 1996, when the judge unexpectedly terminated Ranalleta's testimony and adjourned the hearing. Indeed, all of the earlier hearing dates, with the exception only of February 28 and 29, were totally dedicated to witnesses for the General Counsel and the Respondents.

We also disagree with the judge's suggestion that Indeck should have relied instead on some of its other witnesses to present expert testimony. As Indeck points out in its exceptions, its other witnesses were interested parties to the litigation and therefore not well suited for the role of expert witness.

Most importantly, we disagree with the judge's assessment of the value of expert testimony. This case presents the difficult question of whether Indeck, the owner and developer of the multimillion dollar Corinth cogeneration project, is "an employer in the construction industry" within the meaning of the proviso to Section 8(e). Although under existing Board precedent resolution of this issue "is dependent on the degree of control over the construction-site labor relations [Indeck] elect[ed] to retain,"16 there are only a very limited number of relevant Board decisions and none of them involve the construction of a cogeneration plant or a project of similar magnitude.<sup>17</sup> In these circumstances, the Board believes that Walter's expert testimony on the prevalence in the industry of the types of provisions appearing in Indeck's agreements with its contractors may be relevant. Further, in the interest of developing a full record at the reopened hearing, the Board invites all parties to present expert testimony describing the relationships among owners, general contractors, and subcontractors on projects of this scale, as described in the following Order.

# **ORDER**

This proceeding is remanded to Judge James F. Morton to have the record reopened and the hearing resumed to permit the parties to introduce additional evidence within the scope of this Order. Specifically, the General Counsel or Indeck are permitted to call Vic Ranalletta, Jerry Calloway, and James Walter as witnesses to testify pursuant to the offers of proof in Indeck's March 11 and 22, 1996 letters to the judge. Additionally, the parties, including the Respondents, are permitted to present the testimony of qualified expert witnesses and relevant documentary evidence about the following subjects:

- 1. The functional and operational relationship among project owners, their general contractors, and sub-contractors during the construction of large, multi-million dollar industrial projects in general.
- 2. The functional and operational relationship among project owners, their general contractors, and subcontractors during the construction of cogeneration plants like the Corinth cogen.

Evidence presented in the reopened hearing, including cross-examination of witnesses and submission of rebuttal evidence, shall be limited to the matters encompassed by this Order. Following the close of the hearing, the judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations, including a recommended Order. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

# CHAIRMAN GOULD, concurring.

I agree with the majority's decision to remand this case to reopen the record and receive further evidence on the statutory issue of whether Indeck is an employer within the construction industry. In order to determine whether a remand is appropriate, I have examined whether the determination of Indeck's status as a construction industry employer is necessary to the resolution of this case. For if one of the requirements set forth by the Supreme Court in *Connell Construction Co. v. Plumbers Local 100*<sup>1</sup> is not met, it would be a

<sup>&</sup>lt;sup>15</sup> We are not persuaded by the judge's reasons. Calloway was not merely "busy," but was actually out of the country on important company business. Further, no action needed to be taken to enforce the subpoena because Calloway was a willing witness. Finally, the expected brevity of Calloway's testimony argues in favor of receiving his testimony, not excluding it.

<sup>&</sup>lt;sup>16</sup> Carpenters Local 743 (Longs Drug), 278 NLRB 440, 442 (1986) ("[W]hether an employer is 'an employer in the construction industry'... is dependent on the circumstances of each situation, rather than on the principal business of the employer.").

<sup>&</sup>lt;sup>17</sup> Carpenters (Rowley-Schlimgen), 318 NLRB 714 (1995) (installation of floor coverings); Carpenters Local 743 (Longs Drug), supra (construction of a retail store); Carpenters Chicago Council (Polk Bros.), 275 NLRB 294 (1985) (installation of carpeting); Los Angeles Bldg. Indust. (Church's Fried Chicken), 183 NLRB 1032 (1970) (construction of a retail store); Columbus Bldg. & Construction Trades Council (Kroger Co.), 149 NLRB 1224 (1964) (construction of a retail store).

<sup>&</sup>lt;sup>18</sup> Because the Board has been advised that Judge Morton has retired from the Agency, the Board requests that the chief administrative law judge ascertain the availability of Judge Morton to preside over the resumed hearing. In the event that Judge Morton is not available, the chief administrative law judge may designate another judge to preside, in accordance with Sec. 102.36 of the Board's Rules. See *United States Service Industries*, 324 NLRB No. 132, slip op. at 6, fn. 22 (Oct. 14, 1997).

<sup>&</sup>lt;sup>19</sup> ALJ Exhs. 2 and 6, respectively.

<sup>1421</sup> U.S. 616 (1975).

waste to expend additional Board resources on a remand to the judge, because the agreement would violate the Act regardless of how the Board ultimately resolved the question of whether Indeck is an employer within the construction industry. Accordingly, I have addressed the question of whether the February 20, 1992 "letter agreement" between the Respondents and Indeck is within the scope of the construction industry proviso and, for the reasons set forth below, I have concluded that if Indeck is an employer within the construction industry, the letter agreement would meet one of the prongs of *Connell* and therefore not be violative of Section 8(e) of the Act.

Indeck owns and operates cogenerational facilities nationwide, and developed a plan to build a facility in Corinth, New York. Prior to the commencement of the construction, Indeck was approached by officials of the Respondents who were interested in ensuring that the facility would be built with union labor. Their discussions led to a letter dated February 20, 1992, which provided that "[Indeck is] committed to construct [its] project in Corinth, utilizing [Respondents'] members . . . [and] to further insure [its] commitment and good faith intentions, Indeck will instruct its contractor to execute the National Construction Stabilization Agreement as the Project Agreement." On November 9, 1993, the Respondents filed a civil action against Indeck seeking to enforce the letter agreement. The instant complaint alleges that by filing this civil action the Respondents have violated Section 8(e) "by entering into, maintaining and giving effect" to an agreement in which Indeck agreed to cease doing business with another employer.

The statute requires that in order to enjoy the protection of the proviso, an agreement must be between a labor organization and "an employer in the construction industry."2 In Connell Construction, the Supreme Court set forth certain nonstatutory requirements that must also be met before a challenged agreement falls within the proviso's protection. Connell Construction involved the issue of whether a union-subcontracting agreement between a general contractor and a union which did not seek to represent the general contractor's craft employees was sheltered by the 8(e) construction industry proviso and was entitled to a nonstatutory exemption from the antitrust laws. In discussing the issue, the Court stated that the construction industry proviso's authorization "extends only to agreements in the context of collective bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." The Court found that the subcontracting agreement there was not entitled to a nonstatutory exemption under the construction industry proviso because the agreement was sought outside of a collective-bargaining relationship and not restricted to a particular jobsite.

The above quotation from Connell has been used to define the nonstatutory requirements of the proviso, although, as illustrated by the opposing arguments presented by the parties here, there is disagreement as to the scope of these requirements. The General Counsel and Indeck maintain that Connell established a bright line test whereby if an agreement is not within the context of a collective-bargaining relationship, that agreement is outside the proviso's protection, and that this is the only nonstatutory requirement recognized in Connell. They argue that because Indeck had no craft employees on the jobsite it could not have had a collective-bargaining relationship with the Respondents. They further assert that the Respondents never sought to represent or bargain for any of Indeck's employees, either in a 9(a) or 8(f) relationship. Finally, they note that the Respondents did not seek to represent the employees of the general contractor hired by Indeck to run the project in question, and that the project labor agreement, which Indeck, in the February 20 letter, agreed to direct its general contractor to sign, does not require the general contractor to be a signatory. Rather, the project labor agreement only requires that the general contractor contract with subcontractors who are signatories to the agreement. Accordingly, Indeck and the General Counsel urge that the February 20 letter agreement is outside of the scope of the proviso because it was not sought or negotiated within the context of a collective-bargaining relationship between Indeck and the Respondents.

The Respondents maintain that the agreement was sought and negotiated within the context of an 8(f) collective-bargaining relationship and therefore the agreement is within the scope of the proviso under the first prong of the nonstatutory requirements established by Connell. Further, they maintain that even if the letter agreement was not sought or negotiated within the context of a collective-bargaining relationship Connell established the common-situs requirement as an alternative means by which a challenged agreement could come within the proviso's protection. The Respondents maintain that the letter agreement comes within the scope of the proviso under this second nonstatutory prong of Connell because it is addressed to the common-situs relationships on a particular jobsite. They assert that the basic purpose of the proviso is to avoid labor conflicts on construction projects, and that the letter agreement entered into with Indeck was in furtherance of this goal.

<sup>&</sup>lt;sup>2</sup> The construction industry proviso to Sec. 8(e) states:

*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

<sup>&</sup>lt;sup>3</sup> 421 U.S. at 633.

In my view, the letter agreement was not negotiated in the context of a collective-bargaining relationship as contemplated by *Connell*. In *Colorado Building & Construction Trades Council*,<sup>4</sup> a union sought a subcontracting clause, to eliminate substandard wages in the area, from an employer whose employees it did not represent, and did not seek to represent in the future. In discussing whether the clause was protected by the construction industry proviso, the Board concluded that there was no collective-bargaining relationship between the parties because the union did not represent any of the employer's employees, and did not seek to represent future employees under an 8(f) agreement.

The Board reached a similar conclusion in *Iron Workers Pacific Northwest Council (Hoffman Construction)*,<sup>5</sup> where the Board again found that a subcontracting clause was sought outside of a collective-bargaining relationship despite the fact that the union and the employer had previously had a collective-bargaining agreement. The Board adopted the judge's finding that despite the collective-bargaining relationship previously enjoyed between the union and the employer, the unit of employees once represented by the union no longer existed, and would not exist again in the future. Further, the union had disclaimed interest in representing ironworkers employed by the employer.

In the present case, Indeck did not employ any craft employees sought by the Respondents, and did not subcontract work to any such employees. In addition, the Respondents did not seek to represent any employees employed by Indeck or who might be employed by Indeck in the future.6 Further, unlike a situation in which a general contractor enters into an 8(f) agreement with a union despite having no unit employees at the jobsite, here Indeck is one further step removed from the employees whom the Respondents seek to represent by virtue of the fact that it hired a general contractor, who itself had no unit employees, and the general contractor hired the subcontractors. Notwithstanding the Respondents' assertion that it would have sought to represent any unit employees that Indeck might have employed at the site, the evidence establishes that Indeck did not employ unit employees at the time, and did not anticipate hiring unit employees in the relevant future.7 In this context, I find that the letter agreement between the Respondents and Indeck was not negotiated within the context of a collectivebargaining relationship.

Contrary to the assertions of the General Counsel and Indeck, however, I find that *Connell* does not limit the protection of the proviso to only those clauses entered into in the context of a collective-bargaining relationship. Rather, as set forth below, I find that clauses that are reached outside of a collective-bargaining relationship are within the proviso's protection if they address common situs problems and jobsite tensions. The Supreme Court has recognized that Congress's desire to address these issues played a significant role in the passage of the construction industry proviso.

In Connell, the Court stated that "Section 8(e) was part of a legislative program designed to plug technical loopholes in Section 8(b)(4)'s general prohibition of secondary activities."8 The Court noted that the construction industry proviso "was explained [in the legislative history] only by bare references to the 'pattern of collective-bargaining' in the industry. It seems, however, to have been adopted as a partial substitute for an attempt to overrule this Court's decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951)." The Court went on to note that the discussion in the legislative history of the "special problems" in the construction industry "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite."10

The Court in Connell then stated that the union therein did not assert that its subcontracting agreement was related to any of these problems, in that it did not protect Connell's employees from working alongside nonunion employees, and was not limited to jobsites on which they were working.11 In disagreeing with the union's position that the construction industry proviso authorizes subcontracting agreements with "stranger" contractors, the Court stated that "we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on a particular jobsite as well."12 Thus, the Court recognized that Section 8(e) was "possibly" not limited to only those situations in which a subcontracting clause

<sup>4239</sup> NLRB 253 (1978).

<sup>&</sup>lt;sup>5</sup> 292 NLRB 562 (1989).

<sup>6</sup> Id.

<sup>&</sup>lt;sup>7</sup>The few week hiatus between general contractors in which Indeck did briefly engage subcontractors does not require a different conclusion. The agreement at issue here does not cover this period of time since it relates only to requirements that Indeck has agreed to pass onto general contractors.

<sup>8 421</sup> U.S. at 628.

<sup>&</sup>lt;sup>9</sup>Id. at 628–629 (fns. omitted). In *Denver Building Trades*, the Court rejected the Building Trades Council argument that it had not violated Sec. 8(b)(4) because its picketing of a general contractor at a common-situs location who had hired a nonunion subcontractor was a primary dispute with the general contractor in order to secure an all-union work force. The Court held that the Building Trades Council had an unlawful secondary objective because the only way to achieve an all-union work force was for the general contractor to terminate its contract with the nonunion subcontractor.

<sup>&</sup>lt;sup>10</sup> 421 U.S. at 629–630 (fn. omitted).

<sup>11</sup> Id. at 631.

<sup>12 421</sup> U.S. at 633.

was sought or negotiated within the context of a collective-bargaining relationship.

The legislative history of the construction industry proviso was again discussed by the Court in Woelke & Romero Framing v. NLRB.13 In Woelke & Romero, the Court held "that the construction industry proviso to Section 8(e) of the National Labor Relations Act ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when not limited in application to particular jobsites at which both union and nonunion workers are employed." <sup>14</sup> In discussing the reach of the proviso, the Court noted that the Denver Building Trades case contributed to Congress' decision to adopt the proviso, but rejected the argument that this was the only issue which led to the passage of the proviso. The Court stated that "it is clear . . . that those who wished to overrule Denver Building Trades were concerned about more than the possibility of jobsite friction." In discussing the fact that the proviso is only partly concerned with jobsite friction, the Court stated that "[i]t is important to recognize, however, that reducing jobsite friction is a legitimate purpose. The clauses at issue here serve this goal by ensuring that members of the respondent union need not work alongside nonunion employees."16 In my view, this language in Woelke & Romero clearly indicates that the Court adhered to its statement in Connell that the protection of the proviso "possibly" extends to those agreements negotiated outside a collective-bargaining agreement that are aimed at reducing jobsite friction and common-situs problems.17 While the Connell Court's use of the word "possibly" left some doubt as to whether the proviso extends beyond agreements in the context of a collective-bargaining agreement, I conclude that the proviso does extend to agreements that are aimed at reducing jobsite friction and common-situs problems.

This view is in accord with Board cases which have recognized that, even absent a collective-bargaining relationship, jobsite friction is a legitimate concern. The Board discussed this second prong of *Connell* in *Colo-*

rado Building & Construction Trades Council (Utilities Services Engineering).18 In that case, although the Board found that the challenged subcontracting clause was sought outside of a collective-bargaining relationship, it stated that the clause may be within the protection of the proviso if it was "directed toward the problems raised by the close relationship between contractors and subcontractors at the construction site and/or to the reduction of friction that may be caused when union and nonunion employees are required to work together at the same jobsite."19 The Board ultimately found that the challenged clause there was not lawful, because it was not related to these common-situs concerns, and did not restrict the subcontracting of other types of work at the jobsite or apply only to jobsites where the union's members were working, thus allowing for the possibility that union and nonunion employees would work side by side at a jobsite. In addition, the Board found that the union did not seek the clause to organize a nonunion subcontractor on the building it picketed, since no subcontracting was done at the picketed site. The Board found, therefore, that the clause was not aimed at avoiding problems raised by common-situs relationships, and did not fall within the proviso's protection.

This Board reached the same conclusion in *Hoffman Construction*<sup>20</sup> as well. The disputed clause therein was not sought in the context of a collective-bargaining relationship. The judge addressed the question of whether the challenged clauses were directed to the problems posed by common-situs relations or the potential friction caused by union and nonunion employees working shoulder to shoulder. The Board adopted the judge's finding that the challenged clauses did not address such issues, and therefore did not fall within the proviso's protection under this prong of *Connell*.

The purpose of the agreement between the Respondents and Indeck was to ensure that only union employees were employed at the jobsite. Further, the agreement was limited to the Corinth project, and there is no evidence that the Respondents' interest in seeking the agreement with Indeck was aimed at union objectives elsewhere. The project labor agreement, which Indeck agreed to direct its contractors to sign, had as its stated purpose the promotion of labor harmony and the reduction of friction between employees on the jobsite by ensuring that the entire construction workforce consisted of union workers.

In these circumstances, I find that the February 20 letter agreement between Indeck and the Respondents meets the second prong of the *Connell* requirements under the proviso, because the challenged agreement

<sup>13 456</sup> U.S. 645 (1982).

<sup>&</sup>lt;sup>14</sup> Id. at 666.

<sup>15</sup> Id. at 661.

<sup>&</sup>lt;sup>16</sup> 456 U.S. at 662 fn. 14.

<sup>&</sup>lt;sup>17</sup>I recognize that in *Woelke & Romero* the Court, at 653, states that the *Connell* Court decided that "the proviso did not exempt subcontracting agreements that were not sought or obtained in the context of a collective bargaining relationship." The Court in *Woelke & Romero* was addressing an agreement made in the context of a collective-bargaining relationship. I do not take the Court's statement as a rejection of the possibility that reducing jobsite friction and common-situs problems would meet the requirements of the proviso. Indeed, the Court's discussion of these problems, set forth above, seems to suggest the Court would find that an agreement designed to address these problems would be within the terms of the proviso.

<sup>18 239</sup> NLRB 253 (1978).

<sup>19</sup> Id. at 256

<sup>&</sup>lt;sup>20</sup>Iron Workers Pacific Northwest Council (Hoffman Construction), supra.

was directed at "common-situs relationships on [a] particular jobsite[]" by ensuring an all-union workforce and thereby reducing the jobsite friction that may be caused when union and nonunion employees are required to work together. Accordingly, because I find that the challenged agreement falls within the scope of the proviso to this extent, I join my colleagues in remanding the case to the judge for additional evidence on the issues described in the majority's opinion so that the Board can determine whether the statutory requirement of the proviso has been satisfied.

Alfred A. Norek, Esq., for the General Counsel.

Richard P. Walsh Jr., Esq. (Lombardi, Reinhard, Walsh & Harrison, PC), of Albany, New York, for Glen Falls Building and Construction Trades Counsel.

Gerald M. Waites, Esq. (O'Donoghue & O'Donoghue), of Washington, D.C., for United Association of Journeymen, Local Union No. 773.

Richard J. Reibstein, Esq. (McDermott, Will & Emery), of New York City, New York, for Indeck Energy Services.

# **DECISION**

#### STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that the labor organizations named in the caption above (referred to collectively as the Respondents) have engaged in an unfair labor practice within the meaning of Section 8(e) of the National Labor Relations Act (the Act). In essence, it alleges that the Respondents have applied the provisions of an agreement dated February 20, 1992, with the Charging Parties, Indeck Energy Services of Corinth, Inc.; Indeck Corinth Limited Partnership; and Indeck Energy Services, Inc. (referred to collectively as Indeck), and thereby have entered into, maintained, and given effect to an agreement in which Indeck has agreed not to handle or otherwise deal in the products of, or do business with, another employer or person. More specifically, the complaint alleges that the Respondents brought a civil action seeking \$12 million in damages against Indeck for breach of the February 20, 1992 agreement, and that, by bringing that suit, they had "entered into . . . an agreement" with Indeck, in violation of Section 8(e).

The Respondents admit the agreement with the Charging Parties and to having brought the suit; they assert various affirmative defenses. They aver that Section 10(b) of the Act bars further proceedings as the suit was brought more than 6 months after the filing of the charge by Indeck; they aver also that its lawsuit sought only monetary damages and had no secondary objective; they assert further that the February 20, 1992 letter was not an agreement whereby Indeck agreed to cease doing business with any other person as contemplated by Section 8(e); and they contend that, even if it were, Section 8(e), by reason of the first proviso therein, can not be applicable to it because Indeck is an employer in the construction industry. This proviso states, "(t)hat nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction indus-

try relating to the contracting or subcontracting of work to be done at the site of the construction."

Respecting these affirmative defenses, the General Counsel contends (1) that Section 10(b) of the Act does not bar this proceeding as the Respondents, by their having filed the lawsuit within the 6-month period preceding the filing of the unfair labor practice charge in this case, thereby had "entered into" the agreement as contemplated by Section 8(e); (2) that the agreement had an unlawful secondary objective as it restricted Indeck's right to choose employers with whom it would do business; and (3) that Indeck, the owner of the project that was built, was not an employer engaged in the construction industry and that thus the Resspondents cannot avail themselves of the first provision. Separately, Indeck contends that, even assuming that it is an employer in the construction industry, Section 8(e) is inapplicable because of the absence of any collective-bargaining relationship between it and the Respondents.

I heard this case in Albany, New York, on September 11, 12, 13, 14, and November 13 and 14, 1995, and on February 27, 28, and 29, 1996, when it was adjourned without date. By order dated April 8, 1996, Indeck's request to resume the hearing to enable it to call additional witnesses was denied and the hearing was closed. Indeck's motions to reopen the hearing and for reconsideration were denied. Copies of the submissions by the parties subsequent to the February 29 adjournment, of the April 8 order closing the hearing, of the subsequent moving papers, of the responses, and of the orders thereon, were all made part of the record as administrative law judge's exhibits. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel, Indeck, and the Respondents, I make the following

# FINDINGS OF FACT

### I. JURISDICTION—LABOR ORGANIZATIONS

The pleadings establish, and it is clear from the evidence discussed below, that Indeck, in its operations annually, is an employer over whom the Board would assert jurisdiction under its nonretail standard and that the Respondents are labor organizations as defined in the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background, Indeck's Discussions with the Respondents, the Alleged Unlawful Agreement, a Credibility Issue, and Indeck's Dispute with its EPC Contractor at Corinth

In 1991, Indeck was applying for environmental permits to allow for the building of "cogens," facilities described in detail in a section below. It planned on having one built in each of four cities in the state of New York—Corinth, Olean, Kirkwood, and Yonkers.

Business representatives of a district council of building trades unions in Olean opposed Indeck's application when they heard that Indeck would use a nonunion contractor. Their attorney told Indeck's president, Russell Lindsay, that they would shut down every Indeck job in New York unless the jobs "went union."

Lindsay met twice with these business representatives. At the first meeting, they told him that many of their members were out of work and wanted the Olean project built by building trades employees covered by collective-bargaining agreements with the respective trade unions. At the second meeting, they discussed a copy of a project labor agreement that the business managers gave Lindsay. Lindsay assured them that the Olean job would be "union" and they, in exchange, said that they would not only withdraw their objection to Indeck's application for an environmental permit but would also endorse the Olean project.

Lindsay also spoke by telephone with Paul Fingland, one of the business representatives of the Respondents. Fingland expressed concern over a report that one of Indeck's planned projects was going to be done by a nonunion contractor and he told Lindsay that the building trade unions had manpower available to do its projects. Lindsay assured him that the projects in New York would be built "union or not at all." Lindsay asked for his support in its efforts to obtain approval from local governments for its projects.

On February 5, 1992, Indeck's vice president for project management and construction, John Gillick, met with officials of the Respondents and assured them that their members would do the Corinth job. Gillick outlined the work that was to be done there, discussed further in a separate subsection below. (Briefly, the project included the building of a power plant to generate steam and electricity, a pumping station to draw water from the Hudson river and to pipe it to the plant, a 6-mile pipeline to bring natural gas to the plant, and a 3-1/2-mile overhead electrical transmission line to convey electrical power to a substation of a public utility.) Gillick told the business managers present that Indeck was in the final stages of negotiating with the contractor who would build the power plant and that he did not know whether the gas line and the overhead electrical line would be built by Indeck itself or by other companies. Philip Allen, business agent of Carpenters Local 229, testified that he expressed his desire that members of his local do the footings for the concrete work on the off-site work and on the intakes drawing water from the Hudson river. He also related that the business representative of Operating Engineers Local 106 expressed concern as to its jurisdictional claim to the off-site pipeline. In sum, according to Allen, the Respondents made clear to Gillick that they wanted the project labor agreement to cover the off-site gas pipeline and the overhead electrical transmission line.

In ensuing discussions and correspondence, the Respondents submitted language they wanted Gillick to include in a letter to them which would ensure that a union contractor would do the Corinth project. Gillick included it in his letter to them of February 20, 1992. It constitutes the alleged unlawful agreement and reads, "[Indeck is] committed to construct [its] project in Corinth, [New York], utilizing [Respondents'] members . . . [and] to further insure [its] commitment and good faith intentions, Indeck will instruct its contractor to execute the National Construction Stabilization Agreement as the Project Agreement."

Lindsay thereupon sent copies of a union contract to prospective bidders on the Olean and Corinth projects, notifying them that those jobs must be done according to that union contract. On April 20, 1992, Indeck awarded contracts for Olean and Corinth to CRS Sirrine, Inc. (Sirrine). [The sub-

stance of those contracts is set out in a section below.] Lindsay made it a point to sit in on the negotiations between the trade unions and Sirrine at Olean to smooth out any hitches that might develop and to ensure that an agreement was reached respecting that project.

Respecting the Corinth project, which is the subject of this case, Sirrine's vice president met in July 1992 with the Respondents' business managers and signed an agreement by which Sirrine agreed that "any contractor or subcontractor which is employed on the [work done under Sirrine's contract with Indeck] shall be a signatory to and abide by all the terms contained in the Project Labor Agreement . . . . [a] copy of the Project Agreement negotiated by Sirrine and [the Respondents] is attached. Sirrine will not be a signatory to The Project Agreement itself."

The Respondents proffered testimony that Indeck's vice president, Gillick, had sat in on, and actively participated in, the meeting in July 1992 which led to Sirrine's signing the above agreement. I credit, instead, Gillick's denial that he was present at that session. The sign-in sheet of that meeting did not contain his signature. Sirrine's project manager at Corinth was there and he testified that Gillick was not present. Sirrine's removal from the Corinth job by Indeck hardly would detract from his credibility. Documentary evidence produced by Gillick establishes that he was in Boston on business on the day Sirrine contracted with the Respondents.

The Olean project was built without incident, as was the one at Yonkers. Indeck abandoned its plans for Kirkwood. As for the Corinth project, Indeck had a dispute with Sirrine, discussed next.

Indeck had accepted Sirrines's bid of \$71 million for the work it contracted to do at Corinth. Its contract is known as an EPC contract and is discussed further below. Sirrine's contract provided that the \$71 million amount would be increased in accordance with a certain formula if Indeck did not issue to Sirrine a full notice to proceed with that work by October 31, 1992. When Indeck encountered delays in its scheduling, it asked Sirrine to update the contract price in accordance with its terms. Sirrine wrote Indeck on May 17, 1993, to state that, in view of a change it deemed essential in the financing for the project, it would perform its contractual obligations at a price of \$74,025,000. Indeck insisted that the contract formula would allow for an increase of \$1 million, not the increase of over \$3 million sought by Sirrine. Unable to reconcile the difference, Indeck declared Sirrine in default and canceled Sirrine's contract for Corinth.

Indeck then sent out requests for quotations to arrange for a contractor to replace Sirrine. CNF was selected; Indeck's contract with it was on a "merit shop" basis. That arrangement allows for substantially lower labor costs than those provided for in the agreement Sirrine had signed with the Respondents. The implementation of Indeck's contract with CNF gave rise to the lawsuit by the Respondents against Indeck.

The Corinth cogen became commercially operative in mid-1995.

# B. The Civil Action

On November 9, 1993, the Respondents filed a civil action in the Supreme Court of the State of New York seeking a total of \$12 million in damages from Indeck for its alleged

unlawful breach of the February 20, 1992 letter agreement referred to above. The suit was removed to the United States District Court where the action was stayed pending final adjudication by the National Labor Relations Board in the instant case.

# C. "Cogens"

The Corinth project is known as a "cogen."

There are about 100 companies in the United States that develop, own, and operate "cogens," short for cogeneration facilities. Cogens produce steam and electricity. The steam is sold to companies for use in manufacturing products; the electricity is sold to public utilities to supplement their own production facilities. Under a federal law passed during the oil crises of the 1970s and known by the acronym PURPA, public utilities are obliged to buy electricity from cogens.

#### D. Indeck's Business

Indeck owns and operates seven cogens. It has its principal office in Buffalo Grove, Illinois, with about 80 employees, the great majority of whom are engineers in various specialties, e.g., civil, electrical, and environmental. About 17 of these engineers are assigned to its construction management division. It has a business development division which seeks to locate sites where cogens can be built profitably. Its advertising brochure stated that the detailed engineering construction of its plants is performed by experienced design and buillding contractors under close scrutiny of Indeck's construction management staff, and that Indeck assigns site management and headquarters staff to a project throughout its construction to provide overall management. There are technical elements in the building of a cogen which necessitate Indeck's review and approval.

In 1989, its business development section located several sites in New York State. The one in Corinth would serve an adjacent "steam host," a paper making plant owned by International Paper Company (IP), and a public utility, Niagara Mohawk Power Authority (NiMo).

It takes from 3 to over 5 years from the time its business development section locates a site for a cogen to the time that the cogen produces steam and electricity for commercial use. It takes that time for Indeck to progress through the various steps, discussed in detail below with respect to Corinth, in developing a project.

Initially at Corinth, it had to sign contracts with IP and NiMo; It then had to secure fuel supply contracts; it had to conduct site surveys and conduct title searches; to arrange for environmental and foundation strength tests; to obtain a host of permits and approvals from various governmental bodies; to enter into a contract for the installation of a gas pipeline and another for the erection of an overhead electrical transmission line; it had to send out RFQs (requests for quotations) before choosing one of the EPC companies which submitted bids to build the power plant and appurtenances (EPC is an abbreviation for Engineering, Procurement, and Construction); and then it had to secure the requisite financing.

# E. Outline of the Corinth Project

Indeck's total cost for the Corinth project was approximately \$131 million; of this amount, Indeck had a \$71 million contract with Sirrine, as noted above.

John Gillick, Indeck's vice president of project management and construction, was responsible for the building of this project. Victor Ranalletta was its project manager, reporting to Gillick. Under Ranalletta's supervision were two professional engineers, Construction Manager David Rubato, and Assistant Construction Manager Mike Boyle. Rubato and Boyle worked out of a field office at the Corinth jobsite. The project manager and the contruction managers were responsible for directly monitoring the activities there, from the initial survey work to the date the cogen began operating commercially.

Indeck's plan for Corinth called for its leasing from IP a 4-acre tract located within IP's 72 acres; obtaining permits from various governmental agencies; clearing, grading, and laying roads on the 4-acre tract; building a station next to the Hudson River to pump water from it over a 1000-foot pipeline to a power plant; erecting the power plant, measuring 186' x 186' on the 4-acre tract; laying a 7-mile-long pipe to convey gas from a NiMo main to the power plant; laying another pipe 1/2-mile long to transmit steam from the power plant to IP's factory; and erecting an overhead electrical transmission line 3-1/2 miles long to NiMo substations so that electricity, generated in the power plant, could be "wheeled" (i.e. sent ultimately) to Consolidated Edison of New York.

Typically, Indeck sets up legal entities for each of its projects. For Corinth, it formed, on February 21, 1991, one of the Charging Parties, Indeck Energy Services of Indeck-Corinth Limited Partnership. The Partnership applied to the State of Illinois for authority to operate, representing that its business is to design, develop, construct, finance, own, operate, maintain, repair, and dispose of a cogen. The preamble to the agreement governing the Partnership similarly states that the Partnership is engaged in the financing, construction, ownership, and operation of the Corinth Cogen.

# F. The Initial Phases of the Project

As reflected in an Interconnection Agreement between Indeck and NiMo dated June 1, 1992, Consolidated Edison Company of New York, Inc. (Con Ed) had signed a Power Purchase Agreement with Indeck on November 30, 1988, to buy electricity from Indeck. On June 26, 1991, NiMo agreed with Indeck to deliver that electricity over its system to Con Ed.

On October 30, 1989, Indeck and IP signed an Energy Supply Agreement. It provided that Indeck would "construct and operate a cogeneration facility" to supply steam to IP; it obligated Indeck to design the facility and to develop a construction schedule to meet a June 30, 1993 target date.

Indeck thereupon retained a consulting firm, Hirschberg and Hirschberg, to survey the tract it desired to lease from IP. It also retained a realtor, Winslow Realty, to ensure clear title to that tract and to houses on it, some of which Indeck would purchase and later have demolished. It engaged a soil testing firm, Empire Soils, to take borings for environmental

testing and also to analyze these to determine the compression strength needed for foundation design. It assigned to an engineering firm, Gibbs and Hill, the job of designing a structure to draw water from the Hudson river for use in the power plant. HMM Associates, a "permitting" specialist, was hired by Indeck to prepare environmental and related reports and to use these in processing applications on behalf of Indeck to secure the permits, licenses, and other types of approval needed from various governmental bodies before any grading or other work could begin. Licensing authorities included the Federal Energy Regulatory Commission, the Federal Aviation Administration, the U.S. Army Corps of Engineers, the Departmental of Environmental Conservation of the State of New York, the Public Service Commission of the State of New York, the Departments of Public Works of two counties, the planning boards of several towns, and the Adirondack Park Agency.

The agreements Indeck had with IP and NiMo and certain of the permits referred to above contained "milestones," i.e., dates by which Indeck had to begin construction. Otherwise, it could lose its authorization to do so or be assessed monetary penalties.

On May 17, 1993, IP leased the approximately 4-acre tract to Indeck at Corinth.

G. The Contracts at Corinth for the Installation of the Gas Pipeline, for the Erection of the Electrical Transmission Line, and for the Building of the Power Plant.

# 1. The gas pipeline contracts

In 1989, 1991, and 1993, Indeck signed contracts with companies for the supply and transportation of natural gas needed to power the turbines in the power plant when it was built in Corinth. Indeck's "milestone" was November 1, 1993.

On January 27, 1993, Indeck executed a Gas Facilities Interconnection Agreement with NiMo by which Indeck agreed to construct an approximately 7-mile pipeline to deliver gas from a NiMo main to the power plant to be built at Corinth; NiMo to own the pipeline upon completion. In furtherance of this agreement, Indeck undertook, on behalf of NiMo, the task of securing the requisite permits. In doing so, it retained a specialist, Ross Consulting, to secure land easements and it retained another specialist, Stearns-Wheeler, to do surveying, engineering, soil testing, and permitting work. Indeck used a consulting firm, R.W. Hunt, to ensure that all the pipe to be installed had been properly treated; a radiography company, Able Testing, to determine that the pipe was installed properly; and P.I.E. to conduct field inspections. In addition, NiMo did its own field inspections.

On October 21, 1993, Indeck purchased, at a cost in excess of \$400,000, the piping needed for the gas line and engaged Otis Eastern Service, Inc. (Otis) to design and build the pipeline at a cost of approximately \$2,427,000. Indeck reserved the right to require Otis to add personnel, shifts and overtime work to bring construction up to date if, in Indeck's opinion, Otis fell behind schedule. Otis was required also to follow job schedule requirements as determined by Indeck, to refrain from using 'labor that will cause a conflict with other labor,' and to submit to Indeck weekly employee payroll reports prepared in accordance with the Fair Labor

Standards Act. All of Otis' work was subject to inspection and/or approval by Indeck.

# 2. The electrical transmission line contracts.

On June 1, 1992, Indeck and NiMo signed an Interconnection Agreement which provided for the erection of a 3-1/2-mile overhead electrical transmission line to connect a power plant with units to be built at two NiMo substations, the line to be owned by NiMo upon its completion. This agreement further provided that the power plant would be located in Corinth and is to be constructed, owned, operated, and maintained by Indeck. It also obligated Indeck to design and construct the interconnection facilities.

In furtherance of this agreement, Indeck retained Commonwealth Associates to perform the necessary engineering; Hirschberg and Hirschberg for the surveying; PSI for the subsoil investigation; Winslow Realty to obtain easements; and Hour Electric along with Ciambro Corporation to inspect the transmission line and appurtenances.

On April 8, 1994, Seaward Corporation signed Indeck's Standard Contract Agreement to install "approximately 3.77 circuit miles of 115 kV aboveground transmission line, appurtenances and roads" at a cost of \$3,268,252. The poles used were 120 feet high. The contract contained a description of the work, a work progress schedule and a list of approved subcontractors, scheduling and regulatory requirements, site work and concrete specifications, and provisions for the metal and electrical equipment to be used in the transmission structure and conductors. The contract was quite detailed, specifying items as, for example, one calling for trees to be cut with a chainsaw with brush to be winnowed and left less that 6 feet high; another stated the proper pH value of mixing water to be used in preparing concrete. The agreement also obligated Seaward to use no labor, material, or equipment that will cause a conflict with other labor employed at the facility.

# 3. The power plant contracts

As noted above, Indeck initially retained firms for the surveys and soil investigations of the 4-acre tract it leased from IP. When those steps and others were completed, a two-volume construction agreement, accompanied by a one-volume "Statement of Work," drafted by Indeck's headquarters staff and which sets out the quite detailed terms for building the power plant and some appurtenances were sent to prospective bidders. These three volumes are referred to as the EPC contract. Indeck asked the prospective contractors to direct their technical questions to its mechanical and electrical engineers. The proposed EPC contract provided that Indeck would train personnel to test and operate the power plant. It obligated bidders to submit, for Indeck's approval, the names of its suppliers and subcontractors and a host of documentary material (e.g., performance test procedures, operations manuals, detailed drawings, welding procedures). As observed above, Indeck requires that its approval in those areas be obtained because of its expertise in the design and building of

The 89-page statement of work provided what was termed the "conceptual" engineering for the power plant; the bidder to provide the "detailed" engineering, e.g., blueprints. The statement of work contained quite extensive provisions as to the numerous components of the plant. For example, 25 separate requirements, 10 of which had subsections, were set out one of the components.

The EPC contract provided that an Indeck affiliated company, Indeck Power Supply, will supply critical components of the power plant because, according to the testimony of its vice president, that affiliate makes the best water treatment equipment in the world.

On April 20, 1992, as noted above, Indeck awarded the EPC contract at Corinth to Sirrine, a "construction management" firm, according to one of its officials. He defined that phrase as a company which manages construction projects and which has no craft employees or laborers on its projects. Indeck itself has no craft employees or laborers on its cogen projects.

# 4. Other work contracted for by Indeck at Corinth

Indeck's agreements with IP and NiMo and some of the permits issued to it required it to begin grading and other work on the Corinth project by specific milestone dates. Apparently because it did not secure a construction loan for the Corinth project until November 1993, Indeck undertook to begin that work itself. Thus, in mid-1993, it engaged James H. Maloy, Inc. to grade the 4-acre tract at a cost of \$173,000 and hired several other contractors to do related tract clearing work and also to fence in the tract, all for a cost of about \$20,000. Under the EPC contract, Indeck would get credit against its price for those sums.

# H. Indeck's Oversight of the Corinth Project

As noted above, Indeck's vice president, Gillick, its project manager, Ranalletta, and its construction managers, Rubado and Boyle, were responsible for the construction of the Corinth project. Rubado, assisted later by Boyle, and four clerical employees worked out of a field office at the Corinth jobsite.

Indeck directly controlled the initial phases of the Corinith project—the surveys, title work, soil borings, and permitting. It actively participated on a daily basis in the succeeding phases. Various documents subpoenaed by the Respondents from Indeck disclose that Indeck worked closely with Otis, Seaward, and CNF Constructors, Inc. (CNF), the EPC contractor that replaced Sirrine after Indeck declared Sirrine in default as discussed further below, in the performance of their respective construction contracts at Corinth. Thus, Indeck participated fully in project meetings with these contractors and insisted upon minutes thereof being maintained. The subpoenaed documents disclose also that Indeck closely questioned the contractors respecting, inter alia, jobsite deliveries, the scheduling of work, and inspection procedures. Indeck exercised its contractual rights respecting the selection by these contractors of their suppliers and subcontractors. The employees of Indeck, who now operate the power plant, received a year's training while construction was ongoing and, in connection therewith, they participated in the testing and approval of the turbine and other equipment as it was being installed in the power plant by CNF. Each month, Indeck's project manager, Ranalletta, visited the offices of Northern Engineering in Houston, the firm doing the "detailed" engineering for CNF. Ranalletta was there to verify that the designs were consistent with the requirements set

out in Indeck's statement of work and had input into Northern Engineering's designs. Changes made at the jobsite respecting the work done under the EPC contract must be approved by Ranalletta. Indeck's construction manager at the Corinth jobsite, Rubado, directly supervised inspectors employed by the companies, retained by Indeck, to examine the gas pipeline installation work and also the erection of the electrical transmission line. These inspectors submitted their reports to Rubado each workday.

# ANALYSIS

The Respondents contend that Section 10(b) of the Act bars further proceedings in this case, asserting that the alleged unlawful agreement was reached on February 20, 1992, a date more than 6 months preceding December 17, 1993, the date on which Indeck filed the unfair labor practice charge. The complaint, however, alleges that the Respondents, by having filed suit on November 9, 1993, for an alleged breach of that agreement, had thereby "entered into" an agreement in violation of Section 8(e) of the Act. In effect, the allegation is that the Respondents, in filing the lawsuit, had reaffirmed the allegedly unlawful February 20, 1992 agreement within the 6-month limitation period and thereby 'entered into' the alleged 8(e) agreement within the 10(b) period. This complaint allegation is not time-barred. See Teamsters Local 610 (Kutis Funeral Home), 309 NLRB 1204 fn. 2 (1992); see also General Truck Drivers Local 467, 265 NLRB 1679, 1681 (1982).

The Respondents next contend that it cannot be held to have violated Section 8(e) as its suit sought only monetary damages and thus had no secondary object. It is not, however, the object of the suit that is alleged as the violation but rather that the filing of the suit activated, within the limitations period of the Act, the February 20, 1992 agreement. It is well settled that a party's reaffirmance of contractual commitments within this period is sufficient to satisfy the generalized "enter into" language which Section 8(e) contains. See *Painters Orange Belt District Council 48 (Maloney Specialties)*, 276 NLRB 1372, 1386 (1985).

The Respondents' third contention is that there is nothing in the agreement whereby Indeck agreed to cease doing business with any person. The Respondents, however, agreed with Indeck that its "contractor" on the Corinth project would deal only with subcontractors who have collective-bargaining agreements with the Respondents. Indeck thereby impliedly had agreed with the Respondents not to do business with a "contractor" who would deal with nonunion subcontractors. There is no merit to this contention of the Respondents.

The Respondents also assert that Indeck and Sirrine are joint employers within the meaning of the Act, that the parties have stipulated that Sirrine is an employer in the construction industry, and that Indeck thus must be found to be an employer in the construction industry as contemplated in the first proviso to Section 8(e). The cases relied on by the Respondents in support of its contention that Indeck and Sirrine are joint employers are cases in which one company has control over certain aspects of the wages, or hours of work or of other conditions of employment of nonsupervisory or nonmanagerial employees of another company. Neither Indeck nor Sirrine had such employees on the Corinth project. The cases the Respondents rely on are thus

inapposite to the facts of this case. The functions of Indeck's construction personnel, however, insofar as they impact on the work done under the EPC contract and on the other contracts at Corinth, are, of course, relevant in resolving the issue as to whether Indeck is an employer engaged in the construction industry.

Indeck asserts separately that it is immaterial whether Indeck is an employer engaged in commerce within the proviso to Section 8(e) as, in its view, a collective-bargaining relationship between it and the Respondents must be found to exist before any consideration can be given to that question. It contends that the February 20, 1992 agreement it entered into with the Respondents violated Section 8(e) because it had no employees at Corinth and thus had no collectivebargaining relationship with the Respondents, a sine qua non, in its view, for the 8(e) proviso to obtain, citing Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975); Woelke & Romero Framing v. NLRB, 456 U.S. 645 (1982); and Board cases decided thereunder. The General Counsel has in substance offered the same argument. The Respondents' position is that the basic purpose of the proviso is to avoid labor conflicts on a construction project, that their agreement with Indeck at Corinth was in furtherance of this goal, and the fact that Indeck had none of the craft employees on its payroll there is on no consequence, citing Carpenters (Rowley-Schlimgen), 318 NLRB 714 (1995), and cases cited therein.

While Indeck was the owner of the Corinth project, it was also the project's developer and more importantly its general contractor. It subcontracted the building of the power plant and appurtenances thereto to an EPC contractor, the building of the gas pipeline to Otis, the erection of the electrical transmission line to Seaward, various aspects of site work to others as contingencies arose and to meet construction targets. All this was done to fulfill its obligations, as owner, to IP and to NiMo. In its dealings with them and with others, it held itself out as a construction management company and, indeed, had a separate professional staff division dedicated to that work under a vice president of project management and construction. The basic job of that division was to work with Indeck's other divisions, its affiliates, and with contractors and vendors to ensure compliance with Indeck's overall goal of building a viable facility. It performed that task by its by on site and off site direction of all aspects of the work required-from initial surveying to final tests. Indeck was omnipresent in managing the Corinth project and, in its own documents, it time and again recognized itself in substance as a company engaged in the construction industry.

The General Counsel and Indeck attempt an analogy, asserting Indeck's actions bearing on the Corinth project are comparable to those of a buyer of a house being built by a developer. They view, for example, Indeck's requiring its EPC contractor to buy a GE turbine from an Indeck affiliate as equivalent to the homeowner's selecting a kitchen appliance for the house being built. The proffered analogy fails as it does not take into account the myriad steps undertaken by Indeck in conceiving, in developing, and in completing the Corinth project. The analogy would have potential merit if, at the very least, the buyer of a house under construction was expected to dig and lay his own pipeline interconnect to a utility's gas main and perhaps to personally apply for an environmental permit or two.

The rationale in the Board's recent decision in *Rowley-Schlimgen*, supra, is dispositive of the status of Indeck in this case. It is an employer in the construction industry within the meaning of the 8(e) proviso. If anything, Indeck's status in that regard is even clearer than *Rowley-Schlimgen*'s as the latter was but a subcontractor whereas Indeck was the general contractor, responsible not only for its obligations to IP and NiMo but also for its intracorporate obligations to the whole Indeck entity.

Respecting Indeck's and the General Counsel's contention that the holdings in Connell, supra, and in Woelke & Romero, supra, preclude consideration of the 8(e) proviso because Indeck had no craft employees on site and hence could have no collective-bargaining agreement with the Respondents, it is sufficient to note that, in similar circumstances in Rowley-Schlimgen, supra at fn. 2, the Board effectively held that an employer in the construction industry need not have its own craft employees on site. See also Los Angeles Building & Construction Trades Council (Church's Fried Chicken), 183 NLRB 1032 (1970). Further, Connell is factually inapposite to this case. There, the Court considered apparently conflicting policies of the antitrust statute and the Act. It noted that the Plumbers local union there picketed a general contractor, Connell, to force an agreement allowing that union to engage in "top down" organizing at any site where Connell would be present and without having to negotiate for any unit employee. The Court held that the Plumbers local had thereby used direct restraints on the business market and that the express 8(e) proviso was not intended to permit that Plumbers local to bar all nonunion subcontractors from all such jobsites or to exempt it from the proscriptions of the antitrust statutes. In Woelke & Romero, the Court considered the extent to which the proviso shelters a subcontracting agreement, sought or obtained within the context of a collective-bargaining agreement, which obligated the employer to use only union subcontractors. There, two fact situations were examined. One pertained to a bargaining impasse between the United Brotherhood of Carpenters and Woelke over a subcontracting clause and the Carpenters' picketing to obtain an agreement thereon; the other concerned an attack by a general contractor on a subcontracting agreement between the employer association of which it was a member and an Operating Engineers local. The Court held that the 8(e) proviso protected the unions' seeking, in negotiations with a subcontractor or a general contractor, a subcontracting clause requiring their subcontractors to have collective-bargaining agreements with those unions. The General Counsel and Indeck seem to argue that these Court decisions, in referring to the sheltering of union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, set forth a requisite for the 8(e) proviso to obtain in the instant case that Indeck and the Respondents must have had the type of relationship contemplated in Section 9 of the Act. It appears that they would have the Respondents prove, before the merits of the 8(e) proviso can be considered, that Indeck had unit employees, that a majority had voluntarily selected the Respondents as their exclusive bargaining agent, that Indeck had recognized the Respondents as their exclusive representative, that Indeck had bargained collectively with the Respondents, that Indeck has employees in this unit on the Corinth project, and that the February 20, 1992 agreement was reached pursuant to

negotiations respecting this unit. Their interpretation strains and would defeat the clear rationale of the Court's opinions. In Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 232-233 (1993), the Court considered an agreement like the one in the instant case and found it valid, noting, inter alia, that it was tailored to one particular job and that conditions in the construction industry make posthire collective bargaining difficult. The Board cases cited above do not construe Connell or Woelke & Romero as Indeck and the General Counsel do. See also A.L. Adams Construction Co. v. Georgia Power Co., 733 F.2d 853 (11th Cir. 1984). Cf., Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1027 (1993). A holding that would follow the view advocated by the General Counsel and by Indeck would threaten to introduce instability and uncertainty to the long-standing custom of prehire arrangements in the construction industry.

#### CONCLUSIONS OF LAW

1. Each of the Respondents is a labor organization as defined in Section 2(5) of the Act.

- 2. Indeck is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 3. Indeck is also an employer engaged in the construction industry within the meaning of the first proviso of Section 8(e) of the Act.
- 4. Section 8(e) of the Act is not applicable to the agreement of February 20, 1992, between Indeck and the Respondents in view of paragraph 3 above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The complaint is dismissed.

<sup>&</sup>lt;sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.